

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. No. 798/2011

% Judgment reserved on: 14th December, 2011
Judgment delivered on: 10th April, 2012

EJAJ @ RAJU @ KANA Appellant
Through: Ms. Nandita Rao, Adv. from DHCLSC

versus

STATE Respondent
Through: Ms.Rajdipa Behura, APP for State

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Instant petition is being filed while challenging the impugned judgment dated 17.05.2010 whereby he was held guilty and convicted for the offences punishable under Section 392/34 read with Section 397 IPC.
2. Also challenged the order on sentence dated 18.05.2010, whereby he was sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.5,000/- and in default of payment of fine he shall further undergo SI for 03 months for the offences punishable under Section 392/34 IPC read with Section 397 IPC.
3. Benefit of Section 428 Cr.P.C was also extended to the appellant.

4. Ms. Nandita Rao, Id. Legal Aid Counsel appearing on behalf of the appellant submitted that on 07.06.2008 on receipt of DD no. 26, at PS on receipt of DD No. 26 at PS-Adarsh Nagar, ASI Gopi Ram along with Ct. Baljeet reached at the spot i.e. at main Road, Near Shastri Market, Azad Pur, Delhi where they met complainant Shiv Prasad, Ct. Bajrang, Ct. Tejpal and appellant Ejaj @ Raju @ Kana. Ct. Bajrang produced one buttondar knife and blade recovered from possession of appellant Ejaj.

5. Thereafter, ASI Gopi Ram recorded the statement of complainant Shiv Prasad, wherein he stated that he was working in a Printing Press at Patparganj, Delhi. On that day, he come back to Azadpur from Anand Vihar, by bus and when after crossing the road, he reached near Shastri Market at about 10.30 PM to 10.45 PM, a boy came to him and enquire about the way to Azadur. While he was telling the way, 3-4 boys also came there and caught hold of him. One of them took out a knife and threatened to kill him and took out Rs.2,000/- from the pocket of his shirt. Thereafter they left him. He raised alarm and public persons caught hold one boy and started giving beatings to him. In the meantime, two police constables came there accordingly, public persons handed over that apprehended boy to police.

6. On enquiry his name was revealed as Ejaj @ Raju @ Kana (appellant herein) and while the appellant was being handed over the police officials, he inflicted injuries upon himself with a blade. Police officials prevented him from doing so and made a call at no. 100.

7. On the basis of aforesaid complaint Ex.PW1/A, ASI Gopi Ram prepared Rukka and sent the same through Ct. Bajrang to Police Station,

which culminated in FIR no. 126/2008. Further investigation of the case was entrusted to ASI Gopi Ram.

8. After completion of investigation, chargesheet was filed in the court concerned. Accordingly, after hearing the arguments on the point of charge, charges for committing offence punishable under Section 392/34 IPC were framed against the appellant and co-accused Rakesh @ Kalu. Committing the offence punishable under Section 397 IPC was also framed against the appellant. The appellant pleaded not guilty and claimed trial.

9. The prosecution in order to bring home the guilt of the appellant examined six witnesses. Statement of appellant under Section 313 Cr.P.C. was also recorded, wherein all the incriminating evidence was put to him, to which he denied as incorrect. He claimed to be innocent and led no evidence in his defence.

10. Constable Baljeet Singh (PW4) deposed that on 07.06.2008 on receipt of DD no. 26A, he along with ASI Gopi Ram reached at Main Road, Near Shastri Market, Azadpur, Delhi where they met complainant Shivji Prasad and two constables namely Ct. Bajrang and Ct. Tej Pal, who handed over one person namely Ejaj @ Raju @ Kana / appellant and from his head blood was oozing. Thereafter, he was sent to Babu Jagjiwan Ram Memorial Hospital through PCR Van. He also reached the said hospital, where Doctor of MLC handed over blood stained clothes i.e. one shirt and baniyan of appellant, which were taken into possession vide seizure memo Ex.PW4/A. Blood sample and sample seal were handed over by the Doctor were also taken into vide seizure memo Ex.PW4/B.

11. This witness further deposed that on next day in the morning at about 9 AM, another accused Rakesh Kumar was apprehended and arrested in this Case. During the formal search of co-accused Rakesh Kumar, one buttondar knife was also recovered and after measurement the said knife was taken into possession.

12. Dr. Neeraj Chaudhary (PW5) has proved the MLC number 961 of Ejaj @ Raju @ Kana / appellant prepared by Dr. Yusuf as Ex.PW5/A.

13. After the full trial, Ld. Trial Judge has mainly relied upon the testimony of PW1 Shivji Prasad / complainant, PW3 Constable Bajrang Singh. PW3 deposed that on 07.06.2008, he along with Constable Bajrang Singh were on patrolling duty in the area. There is a Shastri Market at Main Road, where they saw gathering of public persons, who were beatings one boy. They saved him from the clutches of public. In the meanwhile, one person namely Shivji Prasad told them that the said boy along with his associates had committed robbery of Rs.2,000/- on the point of knife and his three associates managed to escape. Thereafter, he conducted the search of the appellant. On his formal search one buttondar knife was recovered. IO prepared the Rukka sketch knife Ex.PW3/A.

14. He further deposed that on seeing the police party, appellant inflicted the injuries upon himself with the help of a blade. The said blade was also recovered and sealed with the seal of GRK and taken into possession vide seizure memo Ex.PW3/C. Thereafter, the said appellant was sent to BJRM Hospital in the custody of Constable Baljeet Singh in PCR Van. Thereafter, the appellant was arrested and on his pointing out, they searched other co-accused persons, but they could not be traced.

15. This witness further deposed, in the morning at about 9 AM, they went to Azadpur Terminal, where co-accused Rakesh Kumar @ Kalu was sleeping on a Takht, who was identified by appellant Ejaz. On his formal search, one buttondar knife was recovered. IO prepared the sketch of knife Ex.PW3/D. The said knife was taken into possession vide seizure memo Ex.PW3/E. IO of the case recorded the disclosure statement of co-accused Rakesh Ex.PW3/F. From the possession of said accused Rs.900/- was also recovered, which was also taken into possession vide seizure memo Ex.PW3/G. Appellant was arrested vide memo Ex.PW3/H. This witness has proved the aforesaid buttondar knife and blade recovered from the possession of appellant as Ex.P-3 and P-4. He also proved the button dar knife and Rs.900/- recovered from the possession of co-accused Rakesh Kumar as Ex.P-5 and P-6 (*Colly*) respectively.

16. On cross-examination PW1 denied the suggestion that co-accused Rakesh was shown to him by the Police in Police Station on 09.06.2008. He also denied to the suggestion that photographs of co-accused Rakesh was also shown to him so that he can identify him in the TIP proceedings. Further denied the suggestion that actual culprits ran away from the spot and appellant, who was under the influence of liquor was apprehended, and falsely implicated in this case. Further denied to the suggestion put, that injuries on the person of appellant were not self inflicted and were due to the beatings of the public. He further denied the suggestion that appellant neither threatened him with knife nor robbed him.

17. Ld. Counsel appearing on behalf of the appellant submits that Id. Trial Judge has failed to appreciate the fact that the prosecution has relied upon

the testimony of PW2, which is not a reliable witness as there are many contradictory statements given by him in his deposition.

18. Further Id. Trial Judge also failed to appreciate that there was no public witness produced for the incident and to the effect the present appellant was arrested from there.

19. Ld. Counsel has pointed out that in cross-examination PW1 and PW3 deposed that there was dark at the place of incident. In this situation, it was not possible for PW-1 to identify the appellant as the person, who showed him the knife. The appellant was fully drunk as is evident from the MLC that at that time, therefore, he was not able to execute the incident on that day.

20. Ld. Counsel also argued that the trial court has also failed to appreciate that it was difficult for the appellant to take out a blade from the match box and sustained injuries upon himself, when he was surrounded by 15-20 people, as stated by PW2 in his statement.

21. Ld. Counsel further submitted that trial court failed to appreciate that there were discrepancies in the statement of witnesses. As per deposition of PW1, he remained in the police station during the entire night due to fever. His statement was recorded during the night. Whereas, as per the statement of PW3, both of them i.e. PW1 and PW3 left the spot at around 3.45 AM. He also stated that the complainant remained with him till 2 AM. He then stated that he went with Rukka to the Police Station at 2 AM and came back to the spot at 3.30 AM. This proves that this case is fabricated one and the knife has been planted by the police.

22. Ld. Counsel has further argued the trial court failed to appreciate that Azadpur is such a crowded place and due to the darkness, witness could not identify the person. The public has shown the appellant, but the fact remains that he was falsely implicated in the present case.

23. Ld. Counsel has pointed out that PW1 deposed that the appellant took out one blade, pointed out a knife towards him at the time of commission of offence. At that time, he took out one blade and caused injury on his head by stating that he would not go with the police. He called the police at no. 100 from a nearby STD Booth. Therefore, Ld. Counsel pointed out that appellant inflicted injury even before the police reached over there, which nullify the prosecution story. Further this witness deposed that the appellant inflicted injuries, when he went to STD Booth, whereas PW3 deposed that the injury inflicted after the police came over there.

24. Ld. Counsel further submits that as per the prosecution story, there were four persons. However till date, no other names have been disclosed or being traced out. Nor identified as who were they. Ld. Counsel also submits that in cross-examination PW3 Constable Bajrang has deposed that on 08.06.2008 they left Police Station at about 9 AM on foot along with IO and other staff. Appellant was in his custody at that time. They were in Uniform and distance between PS-Adarsh Nagar and Azadpur Terminal is about 500 Meters. No other person was sleeping near the co-accused Rakesh. The said witness has admitted the Azadpur Terminal is a thickly populated area. Whereas as per the prosecution story, co-accused was found alone over there.

25. Ld. Counsel has drawn the attention of this Court to Ex.PW3/B, seizure memo of knife. As per PW3, the knife was recovered from the appellant at the spot, whereas in the seizure memo, FIR no. 126/2008 is also mentioned. Whereas, as per the prosecution story, case was registered much later even after taking the appellant to BJRM Hospital, which nullifies the whole story of the prosecution. The said seizure memo should have been in pursuance of DD no. 26.

26. Ld. Counsel has drawn the attention of this Court towards arrest memo of appellant Ex.PW1/B as date of arrest is 08.06.2008 around 4 AM, whereas as per the prosecution story he was arrested at the spot and the arrest memo were also prepared there only. The appellant was taken to hospital at 12.45 AM. Rukka sent at 2 AM and FIR registered at 2.15 AM. Therefore, Jamatalashi was even before the FIR registered and in seizure memo FIR no. and the offences punishable under Section 392/309/34 IPC read with Section 25/27 of A. Act are recorded, which proves that the appellant was fixed in this case and all paper were prepared thereafter.

27. Ld. Counsel has argued that the appellant is aged about 22 years. He is a very poor person and sole bread earner of his family. Therefore, on account of his long incarceration for more than years, his family members are left in a pathetic condition as there is no source of income and they are not in a position to earn their livelihood and maintain themselves. They are under great stress, strain, diffraction, worry and envious due to pitiable living condition.

28. Ld. APP on the other hand, submits that appellant was caught at the spot by two constables. He inflicted injuries with blade. On the personal

search, knife was recovered from his possession. PW1 and PW3 have fully proved the case of the prosecution. Therefore, instant appeal liable to be dismissed.

29. I heard ld. Counsel for parties.

30. From the evidence on record, it is clear that appellant robbed the complainant. He was arrested from the spot and thereafter taken to hospital. MLC conducted there upon. He has been identified by the complainant. In my opinion, witnesses fully supported the case except the recovery of knife. Minor contradictions cannot be fatal to the case. On the other hand, I have no hesitation to say that the investigation conducted in the present case was of in a very casual manner.

31. In the present case, there is no injury caused to anyone in the incident. The weapon recovered is also doubtful as discussed above. Ld. Counsel for the appellant submits that the as alleged complainant was standing on the bus stop, waiting for a bus and someone might have robbed the complainant. The police could not trace those four persons. The appellant being drunk and found over there in the dark, by arresting him, the police solved this case. If it is to be believed that the appellant inflicted injuries on his head then, it nullifies the personal search being conducted by the police as PW-1 stated that the blade he took out from the match box, then why the match box was not recovered from the appellant at the time of his personal search.

32. In the absence of recovery of knife being fully proved and no injury caused to anyone, therefore, appellant could not have been convicted for the offence punishable under section 397 IPC. Therefore, in the facts and

circumstances of the case and the discussion above, I modify the order of conviction dated 17.05.2010. Therefore, the appellant is hereby convicted for the offences punishable under Section 392/34 IPC only, as co-accused Rakesh Kumar @ Kalu was held guilty and convicted for the same offence.

33. The sentence for the offence punishable under Section 392 IPC is maximum 10 years. The appellant has already undergone more than 03 years and 06 months incarceration. Therefore, in the facts and circumstances of the case, I deem it appropriate to let him free for the period already undergone. Therefore, order dated 18.05.2010 is also modified to the extent already undergone.

34. Accordingly, appellant is released on the period already undergone. Jail Authorities are directed to release him forthwith, if he is not required in any other case. Copy of this order be sent to concerned Jail Authority for compliance.

35. Accordingly, Crl. A. 798/2011 is partially allowed.

36. TCR be sent back to the court concerned.

37. No order as to costs.

SURESH KAIT, J

APRIL 10th, 2012

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